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Before the  
Federal Communications Commission  
Washington, D.C. 20554

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In re )  
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Petition for Declaratory )  
Ruling or, in the Alternative, )  
for Rulemaking to Determine )  
Whether Competitive Bidding )  
Should Be Used to License )  
Certain Cellular )  
Rural Service Areas )

Federal Communications Commission  
RM-8897 Office of Secretary

To: The Commission

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COMMENTS OF  
THOMAS DOMENCICH AND  
THE COMMITTEE FOR A FAIR LOTTERY

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November 25, 1996

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TABLE OF CONTENTS

Summary . . . . .	iii
I. Background . . . . .	1
II. The Dismissal of CCPR's Petition and Prompt Rescheduling of the Lottery is Necessary to Avoid an Appearance of Impropriety . . . . .	6
III. There Is No Basis for Departing from Prior Decisions Holding that the Public Interest Requires Lotteries for Applications Filed Prior to July 26, 1993 . . . . .	12
IV. Conclusion . . . . .	17

### SUMMARY

Thomas Domencich and the Committee for a Fair Lottery hereby comment on the "Petition for Declaratory Ruling or, in the Alternative, for Rulemaking to Determine Whether Competitive Bidding Should Be Used to License Certain Cellular Rural Service Areas" filed by Cellular Communications of Puerto Rico, Inc. CFL, whose members are applicants for the cellular rural service areas in which the original lottery winners were disqualified and for which CCPR asks the Commission to hold an auction, opposes the request and urges that the Petition be dismissed and the previously scheduled lottery for the affected RSA markets be reinstated immediately.

The Commission's action postponing the lottery cannot be justified. The events leading up to the Commission's decision to postpone the scheduled lottery create an appearance of impropriety about the manner in which the Commission has proceeded, particularly since the Commission has consistently decided in the past to relottery pending applications filed before July 26, 1993, finding that the public interest would not be served by holding an auction. Departing from these earlier decisions under the circumstances presented here is unwarranted and contrary to established law.

Wholly apart from the question of whether the Commission has proceeded properly, the public interest is not served by changing application procedures in midstream. Members of CFL have expended considerable resources in preparing and prosecuting their cellular lottery applications. Subjecting them to a retroactively-imposed auction scheme at this late date would be unfair and would undermine the public's confidence in the integrity of the Commission's decisionmaking processes.

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**Federal Communications Commission**  
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To: The Commission

**COMMENTS**

Thomas Domencich and the Committee for a Fair Lottery (collectively, "CFL"), by their attorneys and pursuant to the Commission's Public Notice, DA 96-1685, released October 24, 1996, hereby comment on the licensing methodology that should be used to grant authorizations in cellular rural service area ("RSA") markets where the applications of the original lottery tentative selectees were found to be defective.<sup>1/</sup> The following is respectfully shown:

**I. Background**

1. The October 24, 1996 Public Notice offers an abbreviated summary of the background of this proceeding.

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<sup>1/</sup> CFL's members, including Mr. Domencich, filed applications in some or all of the cellular RSA markets that are the subject of this proceeding.

Because the public interest requires that decisions be based upon a complete record, and because of unique circumstances surrounding the Commission's decision to delay a lottery it had already scheduled, CFL submits that a more thorough recitation of events leading up to the issuance of the October 24, 1996 Public Notice is necessary.

2. On July 12, 1996, the Commission released a Lottery Notice<sup>2/</sup> announcing lotteries for six cellular RSAs in which the original lottery winner's application was found to be defective -- Arkansas 9 - Polk, Florida 11 - Monroe, Minnesota 11 - Goodhue, North Dakota 3 - Barnes, Pennsylvania 4 - Bradford, and Puerto Rico 5 - Ceiba -- and listing the mutually exclusive applications that were eligible to participate in the lotteries for these markets. The Lottery Notice announced that lotteries would take place on September 18, 1996 and stated "[t]he lottery [sic] will be held in accordance with the Commission's Memorandum Opinion and Order, PP Docket No. 93-253, FCC 94-123, 9 FCC Rcd 7387 (1994)."<sup>3/</sup>

3. On August 23, 1996, legal counsel to Cellular Communications of Puerto Rico, Inc. ("CCPR") -- a former FCC

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<sup>2/</sup> Mimeo No. 63896, "FCC to Hold Domestic Public Cellular Telecommunications Service Lottery for RSA Markets in Which Previous Winner Was Defective," released July 12, 1996.

<sup>3/</sup> Id., at p. 1.

employee with substantial involvement in FCC auction matters<sup>4/</sup> -- spoke by telephone with the Legal Advisor to the Chairman of the Commission. The purpose of the conversation, as set forth in a memorandum belatedly submitted by CCPR's legal counsel, was to assert that licenses for all six RSAs should be awarded through auctions, rather than lotteries, because "auctioning these RSAs will not harm existing applicants."<sup>5/</sup> RSA applicants in the affected markets who are members of CFL strongly disagree with this contention. Nevertheless, no notification was provided to any competing applicants at the time of the conversation; in fact, more than one month passed before any disclosure of the discussion was made.<sup>6/</sup>

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<sup>4/</sup> Counsel to CCPR is Sara F. Seidman of Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C. Ms. Seidman was an attorney in the Common Carrier Bureau's Policy and Program Planning Division prior to becoming a Special Assistant to General Counsel for common carrier and wireless matters in May of 1992. In that capacity, Ms. Seidman was actively involved in common carrier and wireless matters; and "has been intimately involved in crafting the rules for spectrum auctions". Public Notice, "Sara F. Seidman Departing FCC to Join Mintz, Levin" released March 14, 1995, 1995 FCC Lexis 1702.

Ms. Seidman was the FCC's designated contact representative with regard to at least one Order in PP Docket No. 93-253 (Competitive Bidding). See Fifth Report and Order, FCC 94-178, released July 15, 1994.

<sup>5/</sup> Letter from Sara F. Seidman, Esq., to William F. Caton, Acting Secretary, FCC, September 26, 1996, filed in PP Docket No. 93-253.

<sup>6/</sup> Id.

4. On August 26, 1996, and August 28, 1996, CCPR's legal counsel met with the Legal Advisors to Commissioner Quello and Commissioner Chong, respectively. The purpose of these meetings was to repeat the assertions previously made to Chairman Hundt's Legal Advisor. Again, no prior notice of these meetings was provided to competing applicants who favor a relottery among the pending applicants.<sup>2/</sup>

5. On September 9, 1996, CCPR, by its attorneys, filed the "Petition for Declaratory Ruling or, in the Alternative, for Rulemaking" (the "Petition") that is the subject of this proceeding. The Petition specifically seeks to award only the license for the Puerto Rico 5 - Ceiba RSA by auction rather than lottery, unlike CCPR's earlier communications with Commission Staff, in which CCPR did not distinguish between the Puerto Rico market and all other

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<sup>2/</sup> A letter was filed with the FCC Secretary with respect to these later meetings. See Letter from Sara F. Seidman, Esq. to William F. Caton, Acting Secretary, FCC, August 28, 1996, referencing PP Docket No. 93-253. Other Commission staff received the Letter and the attached memorandum arguing CCPR's position. Id. Copies were not served upon the applicants who had applications poised for participation in the previously announced lottery. And, the Public Notice listing the filing of the post-meeting letter only referenced the generic competitive bidding docket (PP 93-253) and not the restricted application proceedings that were the subject of the forthcoming lottery. See Public Notice "Ex Parte Presentations and Post-Reply Comment Period Filings in Non-Restricted Proceedings," released September 3, 1996, at p. 2.



"markets where the previous lottery winner was defective."<sup>8/</sup>

6. Just one day after CCPR filed its Petition, the Commission announced the postponement of the September 18, 1996 lotteries.<sup>2/</sup> The Commission subsequently released a Public Notice seeking comment on the Petition, stating that the "Petition raises issues concerning the broader applicability of the use of competitive bidding to award cellular licenses for RSAs for which applications were filed prior to July 26, 1993."<sup>10/</sup>

7. As set forth below, the Commission's action postponing the lottery cannot be justified. The events leading up to the Commission's decision to postpone the scheduled lottery create an appearance of impropriety about the manner in which the Commission has proceeded, particularly since the Commission has consistently decided in the past to relottery pending applications filed before July 26, 1993, finding that the public interest would not be

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<sup>8/</sup> See Letters referenced in footnotes 4 and 6, supra.

<sup>2/</sup> Lottery Notice, Mimeo No. 65051, "Wireless Telecommunications Bureau Postpones Cellular Telecommunications Service Lottery for Rural Service Areas," released September 10, 1996. This timing and the fact that the Commission cancelled the lotteries in all six markets, indicate that the action was based upon the prior presentations to the Commission, and not upon the contents of the Petition itself.

<sup>10/</sup> Public Notice, DA 96-1685, released October 24, 1996, at p. 2.

served by holding an auction. Departing from these earlier decisions under the circumstances presented here is unwarranted and contrary to established law.

8. Leaving aside the procedural issue, the public interest is not served by changing application procedures in midstream. Members of CFL have expended considerable resources in preparing and prosecuting their cellular lottery applications. It would be unfair to subject them to a retroactively-imposed auction scheme.

**II. The Dismissal of CCPR's Petition and Prompt  
Rescheduling of the Lottery is Necessary  
to Avoid an Appearance of Impropriety**

9. In crafting its ex parte rules, the Commission has fully recognized its "obligation to avoid the 'appearance of impropriety'". The U.S. Court of Appeals for the D.C. Circuit also has noted the agencies have an obligation "to prevent the appearance of impropriety from secret communications in a proceeding that is required to be decided on the record."<sup>11/</sup> In this instance, the integrity of the Commission's decisionmaking process is called into question by the events which led to the abrupt cancellation of the scheduled relottery of cellular RSA applications.

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<sup>11/</sup> Professional Air Traffic Controllers Org. v. Federal Labor Relations Authorities, 685 F.2d 547 (D.C. Cir. 1982).

10. CCPR's contacts with Commission Staff violated the Commission's rules governing ex parte presentations. An ex parte presentation is:

any presentation made to decision-making personnel but, in restricted proceedings, any presentation to or from decision-making personnel, which:

(1) If written, is not served on the parties to the proceeding, or

(2) If oral, is made without advance notice to the parties to the proceedings and without opportunity for them to be present.<sup>12/</sup>

With certain exceptions, ex parte discussions in "restricted proceedings" are prohibited.<sup>13/</sup> A restricted proceeding includes situations involving mutually exclusive cellular lottery applications, such as the applications listed in the July 18, 1996 Lottery Notice.<sup>14/</sup> In fact, the Commission repeatedly has ruled that ex parte presentations are prohibited with respect to "mutually exclusive applications to provide new cellular radio service", and the prohibition remains in place "until such time as a Commission decision is made and is no longer subject to reconsideration or

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<sup>12/</sup> 47 C.F.R. § 1.1202(b) (emphasis in original). "Decision-making personnel" include the Commissioners' assistants. 47 C.F.R. § 1.1202(c).

<sup>13/</sup> 47 C.F.R. § 1.1208(a). Those exceptions are not applicable here. See 47 C.F.R. §§ 1.1204(a), (b).

<sup>14/</sup> 47 C.F.R. § 1.1208(c)(1)(C).

review by the Commission or the Court."<sup>15/</sup> In this case, CCPR neither provided advanced notice of its oral communications nor served affected parties with copies of its written presentations, in violations of the Commission's explicit rules.

11. CCPR not only violated the Commission's rules with respect to ex parte presentations in restricted proceedings, but also ignored the rules governing ex parte presentations in unrestricted proceedings. Those rules require that any presentation be disclosed on the day of the presentation by filing a letter with the Commission, referencing the number of the proceeding, stating that the letter is an ex parte presentation.<sup>16/</sup> The letters submitted by CCPR were filed late -- two days late in the instance of the meeting with Commissioner Quello's advisor, and 34 days late in the instance of the discussion with Chairman Hundt's advisor.

12. The timing of the Commission Public Notice postponing the scheduled lottery exacerbates the concern that the process has been tainted by ex parte presentations. The Petition was filed with the Commission and delivered by hand to certain Commission Staff on September 9, 1996. On September 10, 1996, the Chief of the Commercial Wireless

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<sup>15/</sup> See, e.g., Public Notice, Mimeo No. 70043 "Notice of Prohibited Presentation", released October 3, 1996.

<sup>16/</sup> 47 C.F.R. §§ 1.1206(a), (b).

Division announced that the lottery was postponed. The near coincidence of these dates forces the conclusion that the ex parte presentations which preceded the filing of the Petition had a material effect on the conduct of the restricted proceedings. In sum, it would appear that improper and untimely disclosed ex parte contacts may have "intruded into the calculus of consideration of the ... decisionmaker".<sup>17/</sup>

13. The Commission should be particularly sensitive to the potential appearance of impropriety in this instance for a variety of reasons. First, the ex parte communications were initiated by a former Commission employee with substantial prior involvement in wireless licensing issues. Whether or not it is the case, it is difficult to avoid the perception, given the immediacy of the action taken by the Commission in furtherance of the Petition, that the former employee enjoyed special access to Commission decisionmakers and received preferential handling of her request.

14. Second, the concern that the decisionmaking process may have been tainted is rendered more serious by the sudden manner in which the Commission altered its relottery plan. The Court has noted that "[i]f the decision maker were suddenly to reverse course ... we might infer

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<sup>17/</sup> Peter Kiewit Sons' Co. v. United States Army Corps of Eng'rs, 714 F.2d 163, 170-71 (D.C. Cir. 1983).

that pressure did influence the final decision."<sup>18/</sup> In this instance, the initial decision to proceed with the relottery of the RSA markets followed specific recognitions by the agency that the applicability of competitive bidding to mutually exclusive cellular radio applications submitted prior to July 26, 1993 presented certain unique issues that required special consideration.<sup>19/</sup> Having highlighted this issue, it is impossible to believe that the long-delayed relottery notice was released without attention having been paid to the "auction vs. lottery" question. Under these circumstances, the Commission's about-face raises troubling questions about the process by which the Commission decided to postpone the scheduled lottery.<sup>20/</sup>

15. In CFL's view, the appearance of impropriety is not cured by the belated disclosure of the prohibited ex parte presentation. While the Commission has noted that the Petition was an impermissible ex parte presentation,<sup>21/</sup> the Commission has not acknowledged the inappropriate contacts

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<sup>18/</sup> ATX, Inc. v. United States Dep't of Transp., 41 F.3d 1522, 1527 (D.C. Cir. 1994).

<sup>19/</sup> Cellular Unserved Areas Lottery Order, 9 FCC Rcd 7387 at para. 1 and n. 3 (citing PP Docket No. 93-253, Second Report and Order, 9 FCC Rcd 2348 (1994), at para. 60 & n. 55).

<sup>20/</sup> Cf. Press Broadcasting Co. v. FCC, 59 F.3d 1365 (D.C. Cir. 1995).

<sup>21/</sup> Public Notice, DA 96-1685, released October 24, 1996, at p. 2.

that preceded the filing of the Petition. Moreover, the further delay in the issuance of the cellular licenses in the six markets at issue in this proceeding can never be undone. In the context of a wireless marketplace in which substantial new entry is taking place because of the assignment of PCS spectrum, and where there are reasons for the last entrant to be concerned about its prospects of success, further delay in the issuance of these cellular licenses will likely subject the Block A cellular licensee to substantial competitive disadvantage and potentially irreparable economic harm.

16. The Commission's ex parte rules give the agency substantial latitude in determining the proper steps to take to cure ex parte violations. See FCC Rules, Section 1.1216. In this case, the interests of justice and the public will be served by immediately reinstating the relottery notice so that the long-delayed licensing process in these markets can be completed at the earliest possible date.<sup>22/</sup>

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<sup>22/</sup>

The Commission also should seriously consider excluding the application of CCPR from the lottery for the Ceiba - 5 Puerto Rico market pursuant to Section 1.1216(a)(1) of the rules.

**III. There Is No Basis for Departing from  
Prior Decisions Holding that the  
Public Interest Requires Lotteries for  
Applications Filed Prior to July 26, 1993**

17. The Omnibus Budget Reconciliation Act of 1993 amended the Communications Act of 1934 to give the Commission authority to issue licenses by auction.<sup>23/</sup> This authority is not absolute. Congress was aware that inequities could result from applying new rules to pending applications, and both the statute and its legislative history express Congress's intent that applications that were pending at the time of passage of the auction statute should not be subject to the new law.<sup>24/</sup>

18. In at least three separate instances in which the Commission has resolved the question of whether applications that were filed prior to July 26, 1993, pursuant to rules providing for lottery of mutually exclusive applications, should be disposed of under those rules or by auction, the Commission consistently has found that the public interest would be served by following the

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<sup>23/</sup> 47 U.S.C. § 309(j); Consolidated Omnibus Budget Reconciliation Act, Pub. L. No. 103-66 ("1993 Budget Act").

<sup>24/</sup> 1993 Budget Act, § 6002(e) (Special Rule), 107 Stat. 312, 397 (1993); H.R. Conf. Rep. No. 213, 103d Cong., 1st Sess. 498 (1993); Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, Memorandum Opinion and Order, 9 FCC Rcd 7387 (1994), at paras. 10, 13.



rules under which the applications were filed,<sup>25/</sup> because in authorizing the use of auctions "Congress ultimately decided that other factors, including considerations of equity and administrative cost and efficiency, justified the use of lotteries for those applicants who, in reliance on the Commission's existing lottery procedures, had filed applications prior to July 26th" 1993.<sup>26/</sup> There is no reason for the Commission to depart from its earlier holdings with respect to long-pending RSA applications. Indeed, the equities in favor of the RSA applicants are even more compelling than those in the cellular unserved area, MDS and IVDS contexts.

19. The Commission repeatedly has found that the public interest in expediting licensing weighs in favor of using lotteries to resolve long-pending mutual

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<sup>25/</sup> Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service, MM Docket No. 94-131, Report and Order, 10 FCC Rcd 9589 (1995) ("MDS Lottery Order"), at para. 92; Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, Memorandum Opinion and Order, 9 FCC Rcd 7387 (1994) ("Cellular Unserved Areas Lottery Order"), at paras. 10, 17; Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, Notice of Proposed Rule Making, 8 FCC Rcd 7635 (1993), at n.150 (IVDS applications).

<sup>26/</sup> Cellular Unserved Areas Lottery Order, at para. 13.

exclusivities.<sup>27/</sup> In the cases at hand, the Commission can proceed with a lottery immediately. But for CCPR and its Petition, the scheduled lottery already would have occurred. An auction, however, is unlikely to be held in the immediate future.<sup>28/</sup>

20. The need for expedition is particularly acute in this instance. The applications for the six RSAs have been pending for eight years. The Commission previously has found that the length of time applications have been pending is a factor in weighing the equities of subjecting to an auction applicants whose business plans did not take into account additional costs necessary to participate in an auction.<sup>29/</sup> The Commission also has recognized the inequities of failing to process applications under rules in effect at the time the applications were filed and of

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<sup>27/</sup> See Cellular Unserved Areas Lottery Order, at para. 14; MDS Lottery Order, at para. 89.

<sup>28/</sup> Statutory requirements and proceedings already completed by the Commission call for numerous spectrum auctions over the following 12 months, including Wireless Communications Services, narrowband personal communications services, and 800 MHz Specialized Mobile Radio services, all of which, like other Commission auctions, will be complex and lengthy undertakings. In any event, rules governing an auction of RSA licenses have not even been proposed, and certainly would be challenged.

<sup>29/</sup> See Cellular Unserved Areas Lottery Order, at para. 14 (applications pending for more than one year); MDS Lottery Order, at para. 89 (applications pending for four years).

according disparate treatment to applications filed within the same general time period.<sup>30/</sup>

21. Under the circumstances, an auction would be administratively inefficient, requiring vastly greater Commission resources to plan and execute than would a lottery of pending applications, which would require virtually no expenditure of time or resources by either the applicants or the Commission.

22. Considerations of fairness also argue strongly in favor of retaining the previous selection process for these markets. In many instances, competing lottery applicants have taken the initiative to bring to the Commission's attention application or qualifications defects that led to the dismissal of the original tentative selectees. The challengers took these actions, often at substantial expense,<sup>31/</sup> in order to promote their own applications in a subsequent relottery. Having performed the beneficial role of "private attorneys general" with the expectation of a relottery in the event of success, the Commission should reward the efforts by proceeding promptly with the licensing process under the previously established

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<sup>30/</sup> MDS Lottery Order, at para. 89.

<sup>31/</sup> For example, CFL expended in excess of \$1,000,000 in legal fees associated with successful challenges to unqualified RSA applicants. CFL's record of success in licensing proceedings in which it participated is evidence of the substantial public service that CFL performed.

rules, rather than subjecting long-pending applicants to further expense and delay by retroactively imposing an auction process.

23. It would be unseemly for qualified applicants, such as the CFL members, to be prejudiced by the fact that the initial tentative selectees in these six markets were unqualified. The Commission exacerbates the prejudice by failing to act promptly to relottery markets which, in some instances, have been ripe for relottery for years. For example, despite the fact that original lottery winners in the Arkansas 9, North Dakota 3, and Puerto Rico 5 RSAs did not challenge an Administrative Law Judge's Initial Decision dismissing their applications -- a decision issued almost four years ago, before the Commission even had auction authority -- the Commission has not held a relottery for these markets. This delay plainly is not the fault of the pending applicants, and undermines any claim that an auction is an inherently more efficient licensing method than other methods.

24. Finally, applying the rules under which the applications were filed and holding a lottery is consistent with Commission decisions holding that the "ill effects" of imposing auction rules and procedures on pending applicants who filed under the Commission's prior lottery rules

"substantially outweigh any potential "mischief of frustrating the interests the rule promotes".<sup>32/</sup>

**IV. Conclusion**

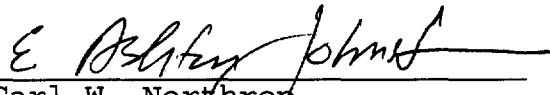
WHEREFORE, the foregoing premises duly considered, CFL requests that the Commission immediately reschedule the lotteries previously announced and to conduct the lotteries without further delay.

Respectfully submitted,

**THOMAS DOMENCICH**

**THE COMMITTEE FOR A FAIR LOTTERY**

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<sup>32/</sup>

MDS Lottery Order, at para. 95 (quoting MaxCell Telecom Plus, Inc. v. FCC, 815 F.2d 1551, 1554 (D.C. Cir. 1987)).

**CERTIFICATE OF SERVICE**

I, Cari Seidman, a secretary with the law firm of Paul, Hastings, Janofsky & Walker LLP, hereby certify that I have on this 25th day of November, 1996 caused a true and correct copy of the foregoing Comments of Thomas Domencich and the Committee for a Fair Lottery to be delivered by hand to the following:

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